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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MEMORIAL-HERMANN HEALTHCARE SYSTEMS, On Behalf and for the Benefit of The Estates, Heirs, Devisees, Legatees, Spouses, Children and/or Parents of Charles Atteberry Jr., and MEMORIAL-HERMANN HEALTHCARE SYSTEM; MEMORIAL-HERMANN HOSPITAL SYSTEM, PETITIONERS

v.

BEN ETHRIDGE and DALINDA SHELTON; CAROL ANN PITTMAN, also known as Carol Ann Peterson, Independent Executrix of the Estate of John Linwood Pittman, Jr., Deceased and Individually as Beneficiary of John Linwood Pittman, Jr.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When an ERISA plan contains legal terms which are, by statute, contradictory does *Firestone v. Bruch* control, or is a Court of Appeals free to use its own rule of interpretation.

II. Whether an ERISA plan is ambiguous for purposes of *Firestone v. Bruch* where the plan language is legally inconsistent.

III. Where an ERISA plan contains language that is legally inconsistent, does the Plan Administrator, granted discretion to interpret the plan, have the authority to reconcile those inconsistencies under *Firestone v. Bruch*, or does a court free to supplant its judgment and reconcile those inconsistencies?

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OPINIONS BELOW

The opinion of the Federal Circuit Court of Appeals for the Fifth Circuit is reported at 405 F.3d 344 (5th Cir. 2005). The final judgment and the amended final judgment of the United States District Court for the Southern District of Texas, Houston Division are unreported.

JURISDICTION

The Judgment of the United State Court of Appeals for the Federal Circuit was entered on April 1, 2005. (App., *infra*, 2a). A timely petition for rehearing *en banc* was denied on May 3, 2005 (App., *infra*, 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

1. 29 U.S.C. § 1001(a) (2005):
   The provisions involved are lengthy and are attached at appendix 29a.

2. 29 U.S.C. § 1001b (2005):
   The provisions involved are lengthy and their pertinent text is set out in appendix 43a.

3. 29 U.S.C. § 1102(a) (2005):

(a) Named Fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall

provide for on or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

4. 29 U.S.C. §§ 1002(16)(A), (21)(A) (2005):
The provisions involved are lengthy and are attached in appendix 47a.

5. TEX. CIV. PRAC. & REM. CODE §§ 71.001-71.004 (West 2005):

The provisions involved are lengthy and are attached in appendix 69a.

6. TEX. CIV. PRAC. & REM. CODE § 71.021(b) (West 2005):

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

STATEMENT

This case arises out the crash of a Eurocopter BK-117 helicopter. Memorial Hermann Healthcare System (hereinafter "MHHS") operates LifeFlight, Helicopter Ambulance Service out of Houston, Texas. On July 17, 1999, a LifeFlight Helicopter crashed near Fresno, Texas. The National Transportation and Safety Board determined that a defect in the helicopter's main rotor components caused the crash. The crash killed Syliva Etheridge and John Pittman, MHHS Employees on board.

Sylvia Etheridge and John Pittman were participants in MHHS's Occupational Benefit Plan for Employees (hereinafter the "Plan"), an ERISA-governed plan. The Plan paid $1 million in benefits to the beneficiaries of each deceased employee. Both Ben Etheridge (hereinafter "Etheridge"), Sylvia Etheridge's father, and Carol Ann Pittman (hereinafter "Pittman"), John Pittman's wife, received benefits from the Plan.

Pursuant to the subrogation provisions of the Plan, MHHS filed suit on behalf of the estate, of the deceased employees, Carol Ann Pittman, and Ben Etheridge against Eurocopter, a German GmBH, in Federal District Court for the Southern District of Texas under diversity. MHHS and Eurocopter negotiated a settlement under which the Plan would almost completely recoup the benefits it paid to the employees beneficiaries.

Etheridge, however, intervened in the district court disputing that the Plan was subrogated to his claims. Pittman filed a declaratory judgment action disputing that the Plan was subrogated to her claims in

state court in Texas. MHHS removed Pittman's declaratory judgment to the federal district court.

The Plan Administrator, the Plan Committee (hereinafter the "Committee"), then convened to officially determine the meaning of the Plan's subrogation provisions. Etheridge and Pittman's lawyers were invited to attend, but did not. The Committee reviewed the language of the Plan. Article 11.1 of the Plan states "the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party . . . including without limitation, any wrongful death claim or action." (App., *infra*, 125a). Under Texas law, a wrongful death claim is the "exclusive right" of the surviving spouse, children, and parents of the deceased. (App., *infra*, 74a). Estates only have survival actions. (App., *infra*, 75a) (stating survival actions belong to the estates of the deceased). Because estates can never, by statute, have a wrongful death claim, the Committee determined that the Plan language was inherently inconsistent. The Committee then determined, in its discretion, that the Plan's subrogation provisions extended to wrongful death claims based on the plain language of the Plan. The Committee further determined that, based on Article 11.2, "each beneficiary of a payment made on Employee's behalf, by accepting Benefits under the Plan consents and agrees . . . to execute and deliver any assignments . . . as the Plan Administrator may require to facilitate the enforcement of the Plan's subrogation rights." (App., *infra*, 125a-126a).

MHHS then moved in the district court for summary that: (1) the Plan language was contradictory; (2) the Plan conferred upon the Committee the sole and absolute discretion to reconcile any inconsistencies in the

Plan language; and (3) their interpretation was not an abuse of discretion and therefore must be upheld. (App., *infra*, 17a-20a). The district court heard the dispute under its federal question jurisdiction. The district court granted MHHS's motion for summary judgment against Pittman, ruling that the Plan was subrogated to Pittman's wrongful death claim as well as the Pittman Estate's survival action. (App., *infra*, 20a). The district court enigmatically held that the Plan had abused its discretion in determining its subrogation rights extended to Etheridge's wrongful death claim. (App. *infra*, 21a)

MHHS and Pittman appealed to the Fifth Circuit. The Fifth Circuit held that the Plan language was unambiguous (plain language) and stated that the Plan was only subrogated to estate claims (App., *infra*, 15a). The Fifth Circuit held that any interpretation contrary to that plain language was incorrect, overruling the Committee's interpretation of the Plan. (App., *infra*, 15a-16a)

REASONS FOR GRANTING THE WRIT

I. CONGRESS HAS DETERMINED THAT THE REGULATION OF ERISA PLANS EFFECTS OUR FUNDAMENTAL NATIONAL ECONOMIC SECURITY

The voluntary, private pension system regulated by ERISA "influence[s] the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security." H.R. Rep. No. 93-533, p. 2 (1973) (App., *infra* 78a). "The continued well-being and security of millions of employees and their

dependents are directly affected by these [ERISA plans]" and their continued efficacy and financial soundness. 29 U.S.C.A. § 1001(a) (2005) (App., *infra.*, 29a-30a). Indeed, the ERISA plan at issue in this particular case alone effects approximately 16,500 employee-partners. As Congress stated, "it is therefore desirable . . . that minimum standards be provided [in the form of ERISA] assuring financial soundness [of these plans]." (App., *infra*, 30a).

II. THE FIFTH CIRCUIT APPLIED AN INAPPROPRIATE STANDARD

1. The Committee Had Discretion to Reconcile Inconsistent Plan Language

The Plan in this case undisputedly granted the Committee "the absolute and unilateral right and power to administer and interpret, construe, and construct the terms and provisions of the Plan, including, without limitation . . . reconciling any inconsistency." (App., *infra*, 127a). As this Court has specifically held, "ERISA abounds with the language and terminology of trust law," and therefore ERISA plan administrators, as fiduciaries, are governed by the principles of trust law. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *see also* H.R. Rep. No. 93-533, p. 12 (1973) (App., *infra*, 80a) ("[ERISA], in essence, codifies and makes applicable to these fiduciaries [plan administrators] certain principles developed in the evolution of the law of trusts"). "A [plan administrator] may be given power to construe disputed or doubtful terms, and in such circumstances the [administrator's] interpretation will not be disturbed if reasonable." *Firestone*, 489 U.S. at 111; *see also* RESTATEMENT (THIRD) OF TRUSTS

(TENTATIVE DRAFT) § 87 (2005) (App., *infra*, 83a) ("when a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision only to prevent an abuse of discretion."); RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) (App., *infra*, 111a). An abuse of discretion only occurs if the plan administrator acts "dishonestly . . . or has acted . . . beyond the bounds of a reasonable judgment." RESTATEMENT (THIRD) OF TRUSTS § 87 note c (2005) (App., *infra*, 86a); RESTATEMENT (SECOND) OF TRUSTS § 187 note e (1959) (App., *infra*, 113a) ("the court will not interfere unless the trustee in exercising or failing to exercise the powers acts dishonestly, or with an improper motive, fails to use his judgment, or acts beyond the bounds of reasonable judgment"). Therefore, if the language of the Plan in this case was inconsistent, the Committee, under *Firestone*, has the power to reconcile that inconsistency and its reconciliation must stand unless it is "beyond the bounds of reasonable judgment" or "dishonest." *Id.*

2. The Plan Language is Inconsistent

Article XI of the Plan, that article at issue in this case, is inherently inconsistent. Article 11.1 of the Plan covers the subrogation rights of the Plan. Article 11.1 states "the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party on account of, or arising out of, the Employees Bodily Injury, . . . including without limitation, any wrongful death claim or action." (App., *infra*, 125a) (emphasis added). Under Texas law, which governs the Plan, an estate can never have a wrongful death action. The Texas Wrongful Death statute, similar to almost every wrongful death statute, states "an action to recover damages [for the death of an individual] as provided by

this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased." TEX. CIV. PRAC. & REM. CODE §§ 71.004, 71.002 (West 2005) (App., *infra*, 74a, 70a)(emphasis added); *compare with* TEX. CIV. PRAC. & REM. CODE § 71.021 (West 2005) (App., *infra*, 75a) (survival of cause of action – a personal injury action survives to an in favor of the legal representatives and estate of the injured person). The phrase "estate claims including any wrongful death claim" is therefore inconsistent *as a matter of law. See e.g., Cabell v. World Service Life Ins. Co.*, 599 S.W.2d 652, 654 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Petovello v. Murray*, 362 N.W.2d 857, 858 (Mich. Ct. App. 1984) (stating that a written contract is ambiguous if it is inconsistent on its face). As a result, the Committee had the power and duty to reconcile the terms of the Plan. *Firestone*, 409 U.S. at 111.

As stated above, after receiving benefits from the Plan, Etheridge and Pittman took the position that the Plan language limited the Plan's subrogation rights to the estate claims, choosing to wholly ignore the "wrongful death" language. The Committee then met, as discussed above, to determine the merits of the differing interpretations. The Committee determined that it could not simply ignore the "wrongful death" language, but instead interpreted the language to mean the Plan's subrogation rights extended to both the estate claims and the wrongful death claims of beneficiaries of payments under the Plan. Under article 11.2, each beneficiary, by accepting a payment under the Plan, agreed to the Plan's subrogation rights.